IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 549 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MUKHALSING BASARSING LAMBANA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 549 of 1994

MRS SHILPA J UNWALLA for the appellant

Mr.K.P. Rawal, APP, for the respondent

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE M.C.PATEL

Date of decision: 20/11/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. The appellant, original accused, has, by filing this appeal under Section 374(2) of the Code of Criminal Procedure, 1974 ('Code' for short), challenged the judgment and order dated April 25, 1994, passed by the learned Additional Sessions Judge, Valsad, at Navsari, in Sessions Case No. 121 of 1992, by which judgment and order, the appellant was convicted under Section 302 of the Indian Penal Code ('IPC' for short) and sentenced to undergo R.I. for life and fine of Rs.500 in default R.I. for six months. The appellant was acquitted by the learned Additional Sessions Judge for the offence punishable under Section 135 of the Bombay Police Act.

2. Briefly stated, the prosecution case is as under: Appellant, Mukhalsing Basarsing Lambana, was a resident of village Chikhli, and doing business of selling vegetables. The wife of the appellant, namely, Deviben, was also selling vegetable in a hand-larry. The appellant had four sons. The eldest son, Arjun, was residing at Bilimora. Remaining three sons, namely, Ashok, Kartarsing (since deceased) and Jogindersing, were residing with the appellant. Ashok and deceased Kartarsing were serving in a garage. The youngest son, Jogindersing, was studying in Std. XI. The incident in question had taken place on October 25, 1992 around 9.30 p.m. at village Chikhli in the locality of Chhipwad. The youngest son, Jogindersing, was not attending the school since one month from the date of the incident and, therefore, deceased Kartarsing had scolded him as to why he was not attending the school and, saying so, had given two to three slaps to Jogindersing. Jogindersing had raised shouts. Therefore, P.W.6, Deviben, along with her daughter, Gopi, had come out of the house. Other persons residing in the locality had also arrived at the place of the incident to rescue Jogindersing. The appellant was sitting near his hand-larry. He also saw deceased Kartarsing giving slaps to Jogindersing. The appellant went near the place of the incident carrying a knife in his hand to rescue his son, Jogindersing, from the assault launched by his son, deceased Kartarsing. It is the prosecution case that the appellant had inflicted blows with the knife on the chest and shoulder of deceased Kartarsing. The blows given by the knife were so severe that the deceased had fallen down and there was profuse bleeding from the injuries caused by the knife. The deceased was removed to the Community Health Center, at Chikhli, where primary treatment was given by P.W.5, Dr. Gunvantrai Patel at the Community Health Center,

Chikhli. After giving the primary treatment to deceased Kartarsing, the Doctor on duty advised that the deceased be taken to the Civil Hospital, Navsari, as his condition was serious. Accordingly, the deceased was taken to K.G. Hospital, at Navsari, around 11.15 p.m. on the same day. P.W.9, Dr. Anil Vyas, examined the deceased and found that his condition was very critical. During the treatment at K.G. Hospital, at Navsari, the deceased expired around 1 p.m. on October 26, 1992. An inquest was held and the dead body of deceased Kartarsing was sent for post-mortem to the Civil Hospital at Navsari. P.W.4, Dr. Ajaykumar Sharma, who was at the relevant time serving as Medical Officer in the Civil Hospital, at Navsari, had performed the post-mortem on deceased Kartarsing on October 26, 1992 between 11.30 a.m. and 12.30 p.m. P.W.7, Jogindersing Mukhalsing, had lodged First Information Report at 5.30 a.m. on October 26, 1992 at Chikhli Police Station against the appellant for the offence punishable under Section 302 of the IPC which came to be registered as CR No.I-194 of 1992. The investigation of the above crime was handed over to P.W.13, PSI, V.D. Rathod. PSI Rathod had recorded statements of the witnesses and had sent the incriminating articles collected during the investigation to the Forensic Science Laboratory. The appellant was arrested on October 26, 1992 under an arrest panchanama and the clothes put on by him and muddamal knife were recovered under a panchanama. On completion of the investigation, a chargesheet came to be filed against the appellant for the offences under Section 302 of the IPC and Section 135 of the Bombay Police Act in the Court of the learned Judicial Magistrate, First Class, Chikhli, which came to be numbered as Criminal Case No.843 of 1992. As the offence under Section 302 of the IPC is exclusively triable by the Court of Sessions Judge, the learned Judicial Magistrate, First Class, Chikhli, committed the case to the Court of Sessions, Valsad, at Navsari, which came to be numbered as Sessions Case No.121 of 1992.

3. Charge Exh.1 was framed against the appellant for offence under Section 302 of the IPC and under Section 135 of the Bombay Police Act. The charge was read over and explained to the appellant wherein he pleaded not guilty and claimed to be tried. The prosecution, in order to prove the charges framed against the appellant, examined (1) P.W.1, Circle Inspector, Chandubhai Nanabhai Patel, Exh.9; (2) P.W.2, Narayan Marutibhai Yadav, Exh.11; (3) P.W.3, Panch Naranbhai Chhanabhai, Exh.13, (4) P.W.4, Dr. Ajaykumar Jankiprasad Sharma, Medical Officer of Civil Hospital, Navsari, Exh.18; (5) P.W.5,

Dr. Gunvantrai Balubhai Patel, Medical Officer of Community Health Center, Chikhli, Exh.20; (6) P.W.6, Deviben Mukhalsing, wife of the appellant, Exh.24; (7) P.W.7, complainant, Jogindersing Mukhalsing, son of the appellant, Exh.26; (8) P.W.8, Milankumar Ramanlal, Exh.28; (9) P.W.9, Dr. Anil Balubhai Vyas, Orthopaedic Surgeon of K.G. Hospital, Navsari, Exh.30; (10) P.W.10, Police Head Constable, Baburav Pundlik, Exh.33, (11) P.W.11, PSI, B.K. Borisagar, Exh.36, (12) P.W.12, Unarmed Police Constable, Madhukar Devchand, Exh.39; and (13) P.W.13, IO, PSI, V.D. Rathod, Exh. 40. The prosecution produced documentary evidence such as First Information Report, panchanama of scene of offence, map of place of incident, inquest panchanama, post-mortem notes, arrest panchanama of the appellant, recovery panchanama of the muddamal knife, report of the FSL, etc. to prove the case against the appellant. After the evidence of the prosecution was over, the appellant was questioned generally and his statement came to be recorded under Section 313 of the Code. The defence of the appellant was of general denial. In the further statement, the appellant stated that he was suffering from cataract and, during night time, he was not able to see and he was falsely involved in the case and, at the time of the incident, he was not present at that place.

4. The learned Additional Sessions Judge, on appreciation of oral as well as documentary evidence and the arguments advanced by the learned advocates for the parties, came to the conclusion that deceased Kartarsing died homicidal death; that the appellant had inflicted the knife blows on the heart and shoulder of deceased Kartarsing with knowledge and intention to cause murder of deceased Kartarsing; that, the appellant had selected vital portions of the body of the deceased and had acted in cruel manner in inflicting the knife blows on the deceased, and the knife injuries caused by the appellant were sufficient in the ordinary course of nature to cause the death of the deceased. On the abovereferred to conclusions, the learned Additional Sessions Judge convicted the appellant under Section 302 of the IPC and sentenced him to undergo R.I. for life and fine of Rs.500 in default R.I. for six months, which has given rise to filing of this appeal. It may be mentioned that the appellant was acquitted for the offence punishable under Section 135 of the Bombay Police Act.

5. Learned advocate Mrs. Shilpa Unwala and learned Additional Public Prosecutor, Mr. K.P.Rawal, have taken us through the entire record and proceedings of the case. We have heard learned counsel for the parties and have

also gone through the judgment of the learned Additional Sessions Judge.

6. Learned advocate, Mrs. Shilpa Unwala, for the appellant, with her usual fairness, has frankly conceded that, in the state of evidence, it is not possible for her to press the case of the appellant. The learned advocate for the appellant has submitted that, in the facts and situation of the case, and the manner in which the incident had taken place, the appellant could not have been convicted for the offence under Section 302 of the IPC, but he should have been convicted for the offence under Section 304 Part II of the IPC. The learned advocate for the appellant has vehemently submitted that the appellant had no intention to cause murder of deceased Kartarsing who was his son. It is further submitted that, on the contrary, the appellant had tried to rescue his son, Jogindersing, who was assaulted by giving two to three slaps by deceased Kartarsing. The learned advocate for the appellant has submitted that, under the circumstances, the appellant could not have been convicted for the offence under Section 302 of the IPC, but he should have been convicted for the offence under Section 304 Part II of the IPC, and the conviction and the sentence be modified accordingly.

7. Learned APP, Mr. K.P. Rawal, on the other hand, has vehemently submitted that the appellant had acted in most cruel manner and had selected vital parts of the body of the deceased in giving two successive knife blows which had caused death of Kartarsing and, therefore, the conviction and the sentence recorded by the learned Additional Sessions Judge should be confirmed and the appeal be dismissed.

8. It is not in dispute that deceased Kartarsing died homicidal death. This fact is also proved by the oral testimony of P.W.4, Dr. Ajaykumar Jankiprasad Sharma, Medical Officer of Civil Hospital, Navsari, and the post-mortem notes and, therefore, the finding recorded by the learned Additional Sessions Judge that deceased Kartarsing died homicidal death deserves to be confirmed.

9 The eye-witnesses examined by the prosecution have proved beyond doubt that the appellant had caused injuries with muddamal knife by inflicting one blow on the chest and one blow on the shoulder portion of the body of deceased Kartarsing which had unfortunately caused his death. The question which arises for our consideration is whether the appellant had really

intended to cause the death of deceased Kartarsing who happened to be his son. It must be stated that, in fact, the appellant had gone to rescue his son, Jogindersing, on whom, deceased Kartarsing had launched attack and slapped thrice. The nature and circumstance in which the incident had taken place is suggestive of the fact that there was no pre-meditation or intention on the part of the appellant to cause death of Kartarsing. The incident in question had taken place all of a sudden. We have carefully scanned through the oral as well as documentary evidence. We are of the view that the prosecution had proved that the appellant had caused death of deceased Kartarsing, but, looking to the situation, circumstance and manner in which the knife blows were inflicted on the deceased, the offence committed by the appellant would squarely fall under Part II of Section 304 of the IPC. Taking into consideration the totality of circumstances, we are of the view that the conviction of the appellant under Section 302 of the Indian Penal Code and the sentence imposed on him to undergo R.I. for life and fine of Rs.500 in default R.I. for six months, deserve to be quashed and set aside and, instead, the appellant is convicted under Section 304 part II of the IPC and sentenced to undergo R.I. for eight years and fine of Rs.500 in default R.I. for six months.

10. As a result of foregoing discussion, the appeal is partly allowed. The conviction of the appellant under Section 302 of the Indian Penal Code and the sentence imposed on him to undergo R.I. for life and fine of Rs.500 in default R.I. for six months, recorded by the learned Additional Sessions Judge, Valsad, at Navsari, in Sessions Case No.121 of 1992, are quashed and set aside, and, instead, we convict the appellant under Section 304 Part II of the Indian Penal Code and sentence him to undergo R.I. for eight years and fine of Rs.500 in default R.I. for six months. The appellant was released on bail vide order dated July 21, 1999 in Misc. Criminal Application No.4300 of 1999. The bail bonds of the appellant shall stand cancelled. The muddamal be destroyed in terms of the directions contained in the impugned judgment and order.

November 20, 2002 (M.H. Kadri, J.)

(M.C. Patel, J.)

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